United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7202

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7202

B P/S

ANNIE TYSON, ET AL.,	:	Appeal from the United States
	:	District Court for the
PLAINTIFFS-APPELLEES	:	District of Conecticut
	:	
v.	:	July 11, 1975
	:	
EDWARD W. MAHER, COMMISSIONER	:	
OF THE STATE OF CONNECTICUT	:	The Honorable
WELFARE DEPARTMENT, ET AL.,	:	M. Joseph Bluenfeld
	:	District Judge
DEFENDANT-APPELLANT	:	

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OPINION BELOW

The decision herein appealed from was rendered by Judge M. Joseph Blumenfeld of the United States District Court for the District of Connecticut. The opinion is reported at 390 F.Supp. 545, and is reproduced in the Joint Appendix at pages 101 through 174.

ISSUES PRESENTED

1. Whether state administrative procedures which impede or prohibit eligible persons already in hardship circumstances from participating in the food stamp program violate rights guaranteed by federal law.

2. Whether having determined that rights guaranteed by federal law were being violated, the District Court was bound to provide relief.

3. Whether the relief ordered, narrowly drawn to eliminate the harm and based upon procedures devised by the federal agency charged with administration of the program, was a proper exercise of the District Court's equitable power.

STATEMENT OF THE CASE

Nature of the Case

On March 22, 1974, plaintiff Annie Tyson, an applicant for food stamp benefits,* filed a Complaint for injunctive and declaratory relief in the United States District Court for the District of Connecticut against defendants-appellants, Nicholas Norton, then Commissioner of Welfare for the State of Connecticut (hereafter "Commissioner")**and Cecil F. McCarthy, Director

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*Under the Food Stamp Act, 7 U.S.C. §2011 et seq., "household" units are "certified" by a state agency (in Connecticut, the Welfare Department) as eligible to participate in the food stamp program (hereafter "program). The certification process to determine eligibility and the amount of bonus is initiated by the state agency's receipt of a signed, dated application. Within thirty days the state agency must interview the applicant, verify the income reported, and mail an authorization to purchase (hereafter "ATP")(if the household is found eligible) or a notice of denial.

The ATP card entitles the recipient to purchase food coupons at less than their face value. The difference between the cost of the coupons to the household and the value of the coupon allotment is deemed the "bonus", the full cost of which is borne by the federal government. The ATP card is valid only for a two week or one month period, depending on the household's frequency of issuance. The expiration date is printed on the card. If a participating household's ATP is lost, stolen, mutilated or not mailed through administrative error, it must be replaced to enable the household to participate during that issuance period.

**On or about February 1, 1975, Edward W. Maher succeeded Nicholas Norton as Commissioner.

of the Food Stamp Program (hereafter "Director") for the Connecticut State Welfare Department (hereafter "Welfare Department"), alleging violations of the Food Stamp Act and regulations and instructions promulgated thereunder and of the United States Constitution. (A.3-10). The gravamen of the plaintiffs' original complaint was that the defendants were violating the federal requirement that all food stamp applications be processed within thirty days. Thereafter, additional plaintiffs intervened and filed an Amended Complaint alleging that the administration of the food stamp program was in contravention of many conjunctive federal requirements. (A.24-62). Plaintiffs charged that in a myriad of ways the defendants had failed to undertake effective action to inform low-income households of the availability and benefits of the food stamp program and insure the participation of all eligible households, thereby violating their rights under the Food Stamp Act and regulations and instructions promulgated thereto. and under the Supremacy Clause and the Fourteenth Amendment to the United States Constitution.*

Among the allegations were those of plaintiffs Burgess and Pierson who claimed that they were unable to complete

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*The issues raised by the plaintiffs are fully set forth by the District Court in the Decision, Tyson v. Norton, 390 F.Supp. 545, 549 (D.Conn. 1975) (A. 104-105).

their applications for food stamps by undergoing an interview at an office of the Welfare Department because of physical injuries (A. 37-39 , paras. 13-14). Both plaintiffs contended that they informed departmental workers that they were unable to drive themselves to the local office for the interview, and defendants refused to provide them with transportation.* On the basis of these factual allegations, plaintiffs contended that the defendants had violated their rights by failing to devise and implement an outreach plan designed to insure their participation in the Food Stamp program as required by 7 U.S.C. §§2011 and 2019(e)(5)(First Count)(A. 41-43) and had violated their rights to have their applications completed in an interview by telephone or in a home visit as permitted by 7 C.F.R. §271.4(a)(2)(ii)(Second Count)(A. 43-45).

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*In his Affidavit, dated April 1, 1974, filed in support of his motion to intervene, plaintiff Burgess stated:

> On March 6, 1974, I was involved in a motorcycle accident in which I shattered the lower part of my right leg and ankle, suffered a cracked joint in my left elbow, bruised parts of both sides of my pelvis, lacerations on my left leg, and banged the shin bone just below the knee cap on the inside of my left leg. As a result of these injuries I am being treated by two physicians and will be unable to work for a minimum of three more months.
>
> (A. 15)

Similarly, plaintiff Pierson stated in her Affidavit, dated April 1, 1974, filed in support of her motion to intervene, that "on January 11, 1974, I fell on the ice in the apartment complex where I reside rupturing a disc in my back. As a result of this injury I am presently unable to work." (A. 17)

Plaintiff Williams alleged that although her household had been certified to participate in the Food Stamp program, the ATP card authorizing her to participate during the last two weeks in March, 1974, was rendered unusable because she did not receive her AFDC assistance check from the defendants within that two-week period. As a result she claimed that her household had been denied the means to participate prior to the next regular issuance date for her household of April 1, 1974.* On the basis of these factual allegations the plaintiffs contended that the defendants had violated F.N.S. (FS) Instruction 734-2(VI)(C) by failing to provide a procedure whereby certified households whose ATP cards are lost, stolen, rendered unusable** or not mailed

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*In her Affidavit filed in support of her motion to intervene, plaintiff Williams recounted the impediments to her household's participation in both the AFDC and Food Stamp programs. She stated that on January 9, 1974, she sought to apply for both programs by telephoning the local office of the welfare department but that she was not allowed to sign and complete her food stamp application until she was given an appointment to appear in person at the local office for an interview on January 29, 1974. Although she received written notification on March 12, 1974, that both applications had been granted and on or about March 16, 1974, received her household's ATP card, she did not receive her first AFDC check until after the ATP card had expired. (A. 11-14d).

**In the Decision Judge Blumenfeld declined to extend relief to cover situations exemplified by plaintiff Williams and instead construed the phrase "rendered unusable" to mean "mutilated." The District Court emphasized that institution and implementation of a valid variable purchase plan would ameliorate situations in which a household is unable to utilize its ATP card because it has insufficient funds with which to cash the card. See, Tyson, supra, at 571-572,n.30. (A. 163).

through administrative error can participate in the food stamp program prior to the next regular issuance date for their household (Sixth Count)(A. 49-51)

Hearing Below

A hearing was held on June 25-27, 1974, at which the Director admitted that the Department never permitted a food stamp applicant to be interviewed by telephone: that an interview was conducted through a home visit only in situations in which an applicant was aged, living alone, and physically disabled; and that no provision was made to permit an interview to be conducted in a home visit for an applicant who lives a great distance from the certification office and for whom no public or private transportation is available. (See also, P.1, Deposition of Cecil McCarthy, at pp. 26-35). The Director also admitted that no written policy had ever been issued by the defendants providing for an emergency, immediate replacement to participating households whose ATP cards are lost, stolen, mutilated or not mailed through administrative error and that no instructions, oral or written, had ever been given to departmental workers explaining the procedures of obtaining immediate replacement of ATP cards in emergency situations or requiring the workers to explain the procedure to certified households. Additional evidence of harm resulting from these Department policies to members of the plaintiff class was received during the

hearing and subsequently. See, A. 69, 72, 77, 79, 81, 19, affidavits of Susie Johnson, Fern Carver, Barbara Mosley, Barbara Britto, Minnie Johnson and Kevin Mahoney.

Disposition Below

Following the hearing and upon consideration of the testimony, depositions of Department personnel, affidavits from plaintiffs, and extensive briefs filed by both parties, the District Court on February 24, 1975, issued a Memorandum of Decision declaring the operation of the food stamp program in Connecticut to be in substantial violation of the Food Stamp Act, 7 U.S.C. §2011, et seq., and federal regulations and instructions promulgated thereunder. Tyson v. Norton, 390 F.Supp. 545 (D.Conn. 1975)(A. 101). Recognizing that at stake in the action was "...the very ability of thousands of low-income households in this State to obtain for themselves the means for affording a nutritiously adequate diet," Judge Blumenfeld held that "there are serious deficiencies in the manner in which the state is operating its food stamp program." Tyson, supra, at 547. (A. 102). Much of the decision treated the various ways in which the Department's administration of the program increased the difficulty of participation. (See, Tyson, supra, at 553-554, 558-559, 561, 564, 566-567, 570, 571, 573; A. 116-119, 128-132, 136, 143-144, 150-151, 159-160, 162, 167.

Citing the defendants' own admission that they had adopted "a far more restrictive" definition of the term "unable" than that allowed by federal law, the District Court found that their policy of allowing telephone interviews under no circumstances and permitting home visits "only where the applicant is elderly, housebound, and living alone," (emphasis in the original), violated the Congressional mandate that they "insure the participation of all eligible households." 7 U.S.C. §2019 (e)(5). Tyson, supra, at 559. (A. 132). Accordingly, Judge Blumenfeld ordered the defendants to submit and implement a "full participation" program which must provide at a minimum for allowing the interview in the application process to be conducted by telephone or in a home visit

> "under a wider range of circumstances than currently allowed including situations in which no household representative is able to visit the district office or circuit-riding location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care." Id., at 574. (A. 70).

The District Court also ruled that although defendants were operating a procedure for the immediate replacment of ATP cards in emergency situations in substantial compliance with FNS (FS) Instruction 734-2(VI)(C)(1969), their failure to promulgate written instructions to program personnel requiring them to explain the procedure to participating households

violated 7 C.F.R. §271.4(a)(8). Tyson, supra, at 571. (A. 62). The defendants' absolute failure to provide procedures for recipients in hardship situations was held to "violate[s] the overall purpose of the Food Stamp Act . . .'to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.' 7 U.S.C. §2011." Id. Therefore, in addition to promulgating a regulation providing for emergency, immediate replacement of ATP cards that are lost, stolen, mutilated or not mailed through administrative error and informing participating households of the general procedure, defendants were also required to permit households unable to travel to a Department office due to the same hardship circumstances listed with respect to the interview issue to initiate the replacement of an ATP by telephoning the Department. Tyson, supra, at 576 (A. 73).

On February 28, 1975, Judgment was entered in accordance with the Decision. (A.175). On March 27, 1975, the Commissioner filed his Notice of Appeal from the District Court's Judgment (A.181), appealing only from those orders requiring the Department: (1)to conduct interviews in home visits or by telephone with those applicants who are unable to travel to a Welfare Department office; and (2) to permit recipients who are unable to travel to a Welfare Department office to initiate the replacement of ATP cards that are lost,

stolen, mutilated, or not mailed through administrative error by telephoning the Department. He also applied to the District Court for a "partial" stay order seeking relief from the provisions which he had appealed. (R. 61, Application). On March 31, 1975, Judge Blumenfeld denied the Application. (R. 61, Application with Order).

Court of Appeals Proceedings

After the District Court's denial of a stay, the Commissioner moved this Court for supersedeas on June 6, 1975. At a hearing on June 25, 1975, this Court (per Mansfield, C.J., Mulligan, C.J., and Clark, Assoc. J., U.S.S.Ct., retired) refused to grant the Commissioner a stay of relief pending determination of the appeal.

ARGUMENT

SUMMARY OF ARGUMENT

The Food Stamp Act is remedial legislation, designed to insure that low-income persons can obtain adequate nutrition. Households eligible under national standards have a right to participate in the program, and Congress intended that the program be administered to provide maximum participation of those who qualify. Administrative procedures which impede or prohibit participation of eligible households violate the rights of those households to receive the food stamp entitlements guaranteed to them by federal law.

In the instant case, the Welfare Department failed to take effective action to insure the participation of all eligible households, and instead erected barriers to that participation. The Department's refusal to conduct a requisite interview in the home or by telephone unless the applicant was aged, disabled and living alone impeded or prevented eligible persons unable for other reasons to travel to a Department office from participating in the program. The Department's absolute requirement that anyone whose authorization to purchase card was lost, stolen, rendered unusable or not mailed thru administrative error travel to a Department office to initiate the replacement procedure

prohibited recipients unable for any reason to travel to a Department office from receiving their food stamp benefits. Such procedural obstacles violate the rights guaranteed eligible households under federal law to adequate nutrition through participation in the food stamp program.

Once a determination is made that federal rights are being violated, a remedy must be supplied. The relief ordered ---that the Department conduct home or telephone interviews with persons in a wider range of hardship circumstances and permit persons in the same circumstances to initiate the procedure for replacing ATP cards by telephone-----was narrowly drawn to eliminate only the particular harm and was based upon procedures for hardship cases devised by U.S.D.A., the agency charged with administering the program on the federal level. Administrative flexibility was not prohibited; the Department was encouraged to develop alternative policies and procedures, provided the goal of maximum participation was furthered and not impeded by them. Such relief therefore constitutes a proper exercise of equitabel discretion necessary to vindicate important federal rights.

I. THE DISTRICT COURT PROPERLY DETERMINED THAT DEFENDANTS HAD VIOLATED FEDERAL LAW BY REFUSING TO PROVIDE HOME OR TELEPHONE INTERVIEWS TO PERSONS UNABLE TO TRAVEL TO A DEPARTMENT OFFICE AND APPROPRIATELY ORDERED THE PRACTICE CHANGED.

The Food Stamp Act requires the state agency to "take effective action to insure the participation of eligible households" in the food stamp program. 7 U.S.C. §2019(e)(5). The United States Department of Agriculture (hereafter U.S.D.A.)promulgated a regulation consonant with this statutory purpose, permitting the certification interview to be conducted "...in the office, in a home visit, or by a telephone call...,"7 C.F.R.§271.4(a)(2)(ii)(a copy of the regulation is attached hereto as Supplement "A"), and also issued an instruction specifying that home or telephone interviews are to be provided to applicants "unable" to come into an office to be interviewed. FNS(FS) Instruction 732-1(II)(B)(2)(1971)(a copy of the instruction is attached hereto as Supplement "B"). The State Welfare Department interpreted "unable" as "elderly, disabled and living alone" and refused to provide home or telephone interviews to those applicants unable to travel to a Department office for other reasons such as physical injury or lack of transportation.

The Court found that defendant's policy was "admittedly... far more restrictive . . . than that allowed by the federal regulations and instructions." Tyson, supra, at 559. (A. 130).Such a restrictive policy, by making certification more difficult or even impossible for those already in hardship situations such as plaintiffs Burgess and Pierson, was found by the Court

to conflict with the state's responsibility under federal law to insure the participation of eligible households. Tyson, supra, at 559. (A. 32).

On appeal, the Commissioner challenges the Court's ability to make this determination of law, relying primarily on cases which hold that a federal agency's interpretation of the federal statute it is charged to interpret or of its own regulation, as long as it is consistent with the purposes of the statute, is entitled to considerable weight in determining the validity or meaning of the provision in issue. Udall v. Tallman, 380 U.S. 1(1965); McLaren v. Fleicher, 256 U.S. 477 (1921); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945); Unemployment Commissioner v. Aragon, 329 U.S. 143 (1946); Power Reactor Co. v. Int'l. Union of Elec. Wkrs., 367 U.S. 396 (1961); Mourning v. Family Publications Services, 411 U.S. 356 (1973); American Tel. and Tel. v. United States, 299 U.S. 232 (1936). The Commissioner's reliance on these cases is misplaced because in this case U.S.D.A. provided nothing more than a restatement of the regulation and instruction, and the cases do not support giving special weight to an interpretation of federal law by a state agency.

U.S.D.A. participated in this case as amicus curiae and also responded to inquiries made directly to it by the defendants. (A. 38 ; A. 100). In both its brief and letter, U.S.D.A. declined to further define the term "unable".

U.S.D.A. did not give its opinion on whether the Welfare Department's practice was in compliance with these requirements, and urged the District Court to make the ultimate determination, stating "[t]he effectiveness with which the state agency is meeting the cited program requirements is a proper matter for the Court's consideration." (A. 8-9).

None of the cases cited by the Commissioner support giving special weight to the Welfare Department's interpretation of federal law in the absence of interpretation by U.S.D.A. The cases do stand for the proposition that any interpretation must be consistent with the purpose of the legislation. See, e.g. Mourning, supra, at 369; Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). In fulfilling its duty to resolve the controversy between the parties as to what federal law requires, the District Court had to consider the purpose of the Food Stamp Act.

Courts have unanimously held that the overriding purpose of the Food Stamp Act is the alleviation of hunger and malnutrition by allowing low-income households to purchase a nutritionally adequate diet. U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 529 (1973); U.S. Dept. of Agriculture v. Murry, 413 U.S. 508, 514 (1973)(Stewart, J. concurring); Bermudez v. United States Dept. of Agriculture, 490 F. 2d 718, 722 (D.C. Cir. 1973), aff'g, 348 F.Supp. 1279 (D.D.C.197), cert. denied, 414 U.S. 1104 (1973); Bennett v. Butz, 386 F.Supp. 1059, 1062 (D. Minn. 1974); Giguere v. Affleck, 370 F.Supp.

154, 156 (D.R.I. 1974). To achieve this goal, Congress intended that the program be administered to facilitate the participation of those eligible. Such Congressional intent is evidenced by the strong language used in 7 U.S.C. §2019 (e)(5), and by complementary statutory provisions designed to make participation more convenient (e.g., 7 U.S.C. §2016(b), which provides variable purchase options; and 7 U.S.C. §2019(h), which permits disabled persons to use food stamps to purchase prepared meals).

The legislative history of the Act further demonstrates Congressional resolve to insure that eligible families are not prevented from participating in the program by burdensome administrative procedures. It was Congress' concern that the program's administration was limiting the potential of the program that brought about the comprehensive revision of the program and increased appropriations for it in 1971. Bennett, supra, at 1064. One of Senator McGovern's primary goals in sponsoring the successful substitute bill was to correct this situation by providing that food stamps be made available "through an administrative system which insures that people who qualify for them actually receive the stamps." 115 Cong. Rec. 28652 (1st Sess., 91st Cong., 1969). Desiring full participation in the Food Stamp Program, Congress envisioned certification and administrative procedures which would overcome transportational and other difficulties of eligible families, by "cut[ting] through the existing administrative

mess" in order to offer the poor family a chance to eat properly. 115 Cong. Rec. 26855; see also, the remarks of Senators Byrd, Mondale, Curtis advocating simpler certification procedures, 115 Cong. Rec., at 26743, 26857, 26882.

Provisions furthering the achievement of the remedial purpose of the Food Stamp Act are "entitled to broad, generous interpretation", and those which retard it must be viewed with disfavor. Hein v. Burns, 371 F.Supp. 1091, 1093-94 (S.D. Iowa 1974), vacated and remanded on other grounds sub nom., Burns v. Hein, ___U.S.__,95 S.Ct. 297, 42 L.Ed.2d 260 (1974). See also, Phillips v. Walling, 324 U.S. 490 (1945). The term "unable", the crux of the controversy here, is used in an instruction which, along with the regulation it is based upon, is designed to further the Act's purpose by facilitating the participation of eligible households. The Department's restrictive interpretation of the term was properly disapproved in favor of an interpretation which better comports with the Act's purpose.

The Department's narrow interpretation of the term "unable" was the foundation of their administrative practice on certification interviews, practices which made participation in the program difficult or even impossible for certain eligible households already in hardship circumstances. Administering the program in such a way that eligible persons do not receive the benefits guaranteed to them frustrates Congressional

intent and violates the Food Stamp Act. Rodway v. U.S.D.A., ___F.2d___, No. 74-1303 (D.C.Cir. June 12, 1975), (slip op., at 679)(a copy of the opinion is attached hereto as Supplement "C"). At issue in Rodway was the validity of the coupon allotment system chosen by U.S.D.A., which the Court held could not be allowed to deny food stamp recipients the opportunity to obtain a nutritionally adequate diet.

> The purposes of the Food Stamp Act - the health and well-being of our populace - are too important, and the legislative intent that those purposes be achieved for substantially all recipients too clear, for us to allow their administrative evisceration.
>
> Rodway, supra, at 683.

Though defending the chosen allotment system, U.S.D.A. conceded in Rodway that the program must be administered "to insure that the certification process itself does not present a barrier to the participation of eligible households." Rodway, supra, at 682, n.25 (quoting affidavit of Richard E. Lyng, Assistant Secretary of Agriculture). The Welfare Department's policy on certification interviews constitued such a barrier and the District Court therefore properly held that the rights guaranteed to plaintiffs by the federal Food Stamp Act had been violated.

Having correctly determined that plaintiffs and members of their class were wrongfully being deprived of their rights under the Food Stamp Act, the District Court was required to

provide a remedy. Sullivan v. Little Hunting Park, 396 U.S. 229, 239 (1969). As the Court stated in Bell v. Hood, 327 U.S. 678, 684 (1946):

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded...federal courts may use any available remedy to make good the wrong done.

The question of judicial power to accord equitable relief is not contingent upon the provision of one in the statute which provides the right. Rather, the issuance of traditional equitable relief is appropriate when "necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 390, 402(1971)(Harlan, J., concurring); J.I. Case Co. v. Borak, 377 U.S. 426, 433(1964).

In the area of food stamp benefits, courts have devised relief in the absence of statutory remedies for persons deprived of benefits by state agencies. Bermudez, supra; Carter v. Butz, 479 F.2d 1084 (3rd Cir. 1973), cert. denied, 414 U.S. 1103 (1973); Stewart v. Butz, 356 F.Supp. 1345 (W.D.Ken. 1973), aff'd., 491 F.2d 166 (6th Cir. 1974); Russo v. Kirby, 335 F.Supp. 122(E.D.N.Y. 1971), reversed on other grounds, 453 F.2d 548 (2nd Cir. 1971). In these cases, recipients had been wrongfully denied benefits due to administrative errors made by state agencies and neither the

Food Stamp Act nor federal regulations provided any remedy. The federal courts fashioned relief in the form of forward adjustments in the purchase price of food stamps to restore the lost "bonus" through "judicial implication of appropriate remedies to redress federal statutory rights." Carter v. Butz, supra, at 1088. This relief was tailored to fulfill the legal maxim "ubi jus ibi remedium", where there is a right there is a remedy. Stewart, supra, at 1349; accord, Rowen v. Provencher, ___F.Supp.___, No. 74-4895-5(D.Mass. 1975)(Memorandum and order dated March 17, 1975)(a copy of the Memorandum and Order is attached hereto as Supplement "D"), where the court ordered additional allotments of food stamps to make up for the bonuses lost by "zero-purchase households" for whom the forward adjustment remedy would provide no relief.*

Similarly, in this case the remedy was precisely tailored to remedy the violation. Because defendants had adopted an unduly restrictive interpretation of "unable", they were ordered to alter their definition to include other circumstances which constituted inability to come into a Department office such as illness, physical injury, lack or transportation or the presence of pre-school children or other persons in the home requiring care. As part of the comprehensive full participation plan they were to devise and

*For a discussion of "zero-purchase households" see the opinion in Tyson, supra, at 562-565. (A. 38-46).

implement, home visits or telephone interviews were ordered to be provided to all persons unable to come in, the procedures specified in the federal regulation and instruction. The relief represents the restrained exercise of equitable discretion, necessary to deal with a general pattern of "inaction where action has been mandated." Tyson, supra, at 560(A. 133).

The Court's order still leaves the Commissioner with many options in devising his Department's procedures with regard to those unable to travel to a Department office location. Although the Commissioner stresses the telephone interview in his Brief and ignores the option of a home visit, the Judgement expressly permits home interviews to be conducted in all situations of hardship if the Department so desires. In addition, the Court specifically ordered the defendants to consider soliciting the cooperation of federally funded agencies and organizations and private and community groups in providing transportation services for applicants, indicating that with proper transportation many of those who are now unable to travel to an office because of lack of transportation or even certain injuries would be able to come. Tyson, supra, at 574. (A. 170). The Court also recognized that the degree of inability to visit a district office is directly related to the number and geographic placement of such offices and directed the Department to continue the

current circuit-riding program and consider expanding it further. Id., at 559, 574. (A.131 170) See also, affidavit of Kevin Mahoney, A. 63).

Neither did the order of the District Court prohibit the use of an "authorized representative" in situations which require it. The applicable instruction provides that such a representative will be allowed only when it is "impossible for the head of the household or the spouse to make application" (emphasis in original), and only then if certain additional conditions are met, the first of which is that "[T]he head of the household or his spouse cannot be interviewed." F.N.S. (FS) Instruction 732-1 (II)(C)(1)(a). For example, an applicant's health might be so frail that he or she could not even receive a representative of the department in the home, or speak on the telephone. In such a case an authorized representative may have to be designated in order to enable the household to "make application". Nothing in the provision however, supports the Commissioner's contention that this exceptional procedure "was the primary means conceived by the Secretary to deal with situations where a household would be unable to make application in person for food stamps." (Brief of Appellants, at 23). The availability of this option is yet another manifestation of concern that no one be prevented from participating in the program by the administrative failure to adjust certification procedures for circumstances beyond the household's control.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT DEFENDANTS' INFLEXIBLE POLICY OF REFUSING TO ISSUE REPLACEMENT ATP CARDS TO ELIGIBLE RECIPIENTS UNLESS THEY FIRST TRAVEL TO A DESIGNATED OFFICE TO SIGN AN AFFIDAVIT VIOLATED FEDERAL LAW AND PROPERLY ORDERED AN ALTERATION OF THE PROCEDURE FOR THOSE RECIPIENTS "UNABLE" TO TRAVEL.

Congress declared the purpose of the Food Stamp Program to be "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households." 7 U.S.C. §2011. In instances where the ATP card is lost, stolen, mutilated or not mailed through administrative error, a household's access to adequate nutrition is delayed. The persons in the household face the danger of injury to their health and well-being unless they quickly regain the means of purchasing an adequate diet. Prompt replacement of ATP cards is therefore required in order to serve "the nutritional purposes of the statute..." Carter, supra, 479 F.2d, at 1086.

In keeping with this purpose, U.S.D.A. issued an administrative instruction as part of its procedural requirements for state agencies, F.N.S. (FS) Instruction 734-2 (VI)(C), Rev. 1 (1969)(a copy of the instruction is attached as Supplement "E"). The instruction requires that in "emergency" cases, including the loss or theft of ATP's, the state agency must replace the ATP "immediately" so that the household can participate "before the next regular preparation of ATP's". The following sentence of the instruction further stresses the emergency nature of the situation by cautioning that there can be "no delay in allowing the household to

participate." The defendants admitted below that their unwritten replacement procedure required every household which reported the loss, theft, mutilation, or non-receipt of its ATP card to travel to a local office, return home to wait for the issuance of a new card to be mailed from the central machine data processing unit, and made no provision for recipients unable to travel to a departmental office to initiate the replacement procedure.

The District Court found that the defendants' general practice for the issuance of replacement cards in emergency situations complied substartially with the immediacy requirement of F.N.S. (FS)Instruction 734-2(VI)(C),* but also found that the defendants refused to depart from this procedure to provide for households who were unable to travel to a departmental office to initiate the replacement process. The Court held that this failure, by endangering low-income households' level of nutrition, violated the overall purpose of the Food Stamp Act contained in 7 U.S.C. §2011. Tyson, supra, at 571 (A. 62).

On appeal, the Commission contends that the District Court erroneously determined the requirements of federal law. He claims that 7 U.S.C. §2011 is simply a "preamble" provision which cannot be utilized as a basis for determining the

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*The department's failure to issue written instructions to program personnel requiring them to inform all participating households of their practice, however, was held to violate 7 C.F.R. §271.4(a)(8), 40 Fed. Reg. 1891 (1975). Tyson, supra, at 571 (A. 62).

federal requirements concerning the replacement of ATP cards in emergency situation. Brief of Defendants-Appellants, at 44-46. But the cases upon which the Commission relies merely support the proposition that language in a "preamble" which conflicts with other expressed statutory language cannot be used to overrulethose explicit terms. E.g., Robinson v. Difford, 92 F.Supp. 145, 148(E.D.Pa. 1950). In the instant case there are no specific statutory or regulatory provisions which conflict with the declaration of 7 U.S.C. §2011.

The Court in Giguere v. Affleck, 370 F.Supp. 154 (D.R.I. 1974), relied in part on the same statutory provision in striking down a state policy which hindered acquisition of replacement ATP cards. Rhode Island had adopted a policy whereby all ATP cards expired within five days of issuance. Mrs. Giguere's ATP card failed to arrive on time due to administrative error, and by the time she received the card it was no longer valid. The state agency's refusal to make any exception to its general policy, depriving Ms. Giguere and members of her class of their food stamp benefits,was held to violate the right to adequate nutrition guaranteed by federal law.

> The Congressional intent, buttressed by the U.S.D.A. Instructions relative to emergency issuance indicate that eligible households should be given every practicable opportunity to participate in the program. Inexorable adherence to time schedules only thwarts the laudable purpose of the Food Stamp Program by making it difficult if not impossible for the plaintiff and the class to participate on a regular basis. Giguere, supra, at 161.

Similarly, in the instant case the Welfare Department refused to vary its regular policy for obtaining a replacement ATP card for those in hardship cases. This refusal to make provision for recipients unable to travel to a local office to initiate the replacement process meant that even with knowledge of the procedure, some recipients were effectively barred from obtaining benefits to which they were entitled.* Such a result, contrary to Congressional intent, violates the rights of plaintiffs under the Food Stamp Act. See, Rodway, supra.

Once the District Court found that plaintiffs were wrongfully being deprived of their rights to participate in the program guaranteed to them by the Food Stamp Act, it was required to issue the necessary relief. Bell v. Hood, 327 U.S. 678, 684, (1946). As in the interview situation, the remedy was indicated by the violation. The relief ordered by the District Court - to permit persons in the same hardship cases as enumerated with respect to the certification interview to initiate the procedure for replacing ATP cards in emergency situations by telephone - was an adaptation of the procedures devised by U.S.D.A. for conducting the certification interview for applicants in hardship cases. Defendants were ordered to permit recipients who are unable to

*Of course, the Department's failure to require by written regulation that all recipient households be informed of the regular replacement procedure also caused persons eligible for replacement cards to lose food stamp benefits to which they were entitled. (A. 69, 72, 77, 79, 81).

travel to a Welfare Department office to initiate the replacement of an ATP by telephoning the Department. Tyson, supra, at 576 (A. 73). The Court also ordered the defendants to draft and promulgate instructions directing all certification workers to inform participating households of the emergency procedures for replacement. Id.

The Commissioner now claims that this relief violates a subsequent F.N.S. (FS) Instruction 734-2(VI)(C), Rev. 2, promulgated October 1, 1974, although this instruction was never presented at any time to the District Court either by the defendants or U.S.D.A. as amicus curiae despite ample opportunity at the Chamber Conference held on October 22, 1974 and in subsequent briefs submitted to the District Court.* Plaintiffs were unaware that a revised instruction had been issued. F.N.S. Instructions are not published in the Federal Register, presumably because they constitute an exception to the general provisions of the Administrative Procedure Act, 5 U.S.C. §553(b)(A).

Plaintiffs submit that the revised instruction does not conflict with the Order of the District Court. There is certainly no specific prohibition which would prohibit a provision for "hardship cases" such as that ordered by the District Court.** Furthermore, even if the revised instruction

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*Indeed, even after the entry of Judgment by the District Court the defendants did not apprise the Court of the revised regulation as late as March 27, 1975, when they sought a stay of the relief ordered pending appeal. (P. 61, Application for a Partial Stay Order).

**Similiarly, there was no such prohibition in the first instruction: the difference between the 1969 and 1974 revisions is not therefore, as the Commissioner contends, "significant" for purposes of this case. (Brief of Petitioner, at 40).

were interpreted as requiring a prior signed affidavit before issuance of a replacement ATP without exception, the Commissioner could fulfill the requirements of the instruction while still complying with the orders of the District Court.

The Commissioner can provide an affidavit by mail along with the replacement ATP and require that it be signed and mailed back to the Department before the ATP is used by the recipient. Workers can make home visits and witness the signing of an affidavit in every case before tendering a replacement ATP to a recipient. The affidavit could also be obtained at the time of initial certification by including a statement pertaining to a possible replacement situation in the application signed by all applicants, similar to the statement now included with regard to other kinds of changed circumstances. Perhaps the simplest procedure that the Commissioner could devise to implement the relief ordered by the District Court would be to include the affidavit in the reverse side of the replacement ATP card and instruct the recipient to execute the affidavit before exchanging the card for food coupons.

If this Court should doubt whether the revised instruction is consistent with the District Court's it should remand the case for consideration by the District Court as to (1) whether the instruction is consistent with its Order:

(2) whether the instruction is consistent with the purposes of the Food Stamp Act; (3) whether the instruction was promulgated in accordance with the Administrative Procedure Act, see, Rodway, supra; and (4) whether the instruction violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution as plaintiffs claimed in the Ninth and Tenth Counts of their Amended Complaint (A. 53-57, paras. 64-69). See, Hein v. Burns, 371 F.Supp. 1091 (S.D.Iowa, 1974), vacated and remanded sub nom. Burns v. Hein, ___U.S.___, 95 S.Ct. 297, 42 L.Ed. 2d 260 (1974).

CONCLUSION

For all the foregoing reasons plaintiffs respectfully urge this Court to affirm the Judgment issued by the District Court.

Respectfully submitted,

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7 C.F.R. §271.4(a)(2)(ii)

§271.4 Certification of households.

(a) Household certification...

(2) Certification of other households. The State agency shall provide for the certification of other households by...

(ii) An interview at initial certification and any subsequent certification with the applicant or his authorized representative in a personal contact in the office, in a home visit, or by a telephone call (the interview requirement will be continued until quality control demonstrates to FNS the effectiveness of the forms and certification system);...

II APPLICATION PROCESS

For the purposes of applying for the Program, households fall into two categories--assistance and nonassistance. Assistance households will be certified solely on the basis of information contained in an affidavit and the assistance case file. The application process for nonassistance households consists of three elements--completion of an Application form, an interview, and required verification and documentation. Application for participation will be made in the name of the head of the household. The head of the household is the member of the household who assumes the primary financial responsibility for the household.

B Nonassistance Households. The following application process will be used for the initial certification and recertification of all other households.

2 Interview.1/ It will be necessary to interview all nonassistance households including those whose Applications are submitted by mail. The head of the household, the spouse, or the authorized representative will be interviewed by a certification worker who will review the Application with the applicant to determine that it is filled out correctly and that no inconsistencies exist.

Persons who are unable to come into the office to be interviewed may be interviewed in a home visit or by telephone. When it is necessary to interview the applicant by telephone, the reason should be fully documented in the case file. Inconvenience to the applicant will not be sufficient reason for conducting the interview by telephone.

During the interview, the household should be verbally advised of its right to appeal the certification worker's decision (see FNS(FS) Instruction 732-14).

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Miriam RODWAY et al., Appellants,

v.

The UNITED STATES DEPARTMENT OF AGRICULTURE et al.

No. 74-1303.

United States Court of Appeals, District of Columbia Circuit.

Argued March 5, 1975.

Decided June 12, 1975.

Members of low income households brought suit challenging coupon allotment system established by the United States Department of Agriculture to implement Food Stamp Act directive that food stamp recipients be given an opportunity to obtain a nutritionally adequate diet. Following remand from the Court of Appeals, 482 F.2d 722, the United States District Court for the District of Columbia, John H. Pratt, J., 369 F.Supp. 1094, granted summary judgment for defendants, and plaintiffs appealed. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that (1) the Secretary of Agriculture failed to comply with the procedural command of the Administrative Procedure Act in promulgating the allotment regulations, and the failure could not be cured by litigation affidavits, and (2) while there is room for administrative convenience and necessity in the administration of the food stamp program, that does not justify automatically ignoring generalized, easily quantified, and easily verified differences among recipients under the rubric of administrative necessity; accordingly, an averaging system can be sustained only if the Secretary can show that such a system will deliver coupons to substantially all recipients sufficient to allow them to purchase a nutritionally adequate diet.

Remanded with instructions.

Wilkey, Circuit Judge, concurred in the result, with opinion.

1. Agriculture ⇐2

Although the Administrative Procedure Act does not, by its own terms, govern the issuance of allotment regulations for the food stamp program, the United States Department of Agriculture has promulgated a regulation, which has the force and effect of law, making the procedural requirement of

the APA applicable to all of the USDA's rule-making relating to "public property, loans, grants, benefits, or contracts." 5 U.S.C.A. § 553(a)(2), (d); Food Stamp Act of 1964, §§ 2–15, 7 U.S.C.A. §§ 2011–2025.

2. Administrative Law and Procedure ⇐417

Validly issued administrative regulations have the force and effect of law.

3. Administrative Law and Procedure ⇐394, 395

Under the Administrative Procedure Act, an agency must provide the public with notice of proposed rules, an opportunity to comment upon them, and a concise general statement of their basis and purpose that justifies the rules in light of the comments received. 5 U.S.C.A. § 553.

4. Administrative Law and Procedure ⇐394

Agriculture ⇐2

In promulgating allotment regulations for the food stamp program, the United States Department of Agriculture did not, by reason of the procedures surrounding its adoption of rules for the administration of the food stamp program, satisfy the Administrative Procedure Act requirement of providing the public with notice of the proposed allotment regulations, since, however procedurally proper the adoption of the rules, they did not concern in any way the allotment regulations. 5 U.S.C.A. § 553.

5. Administrative Law and Procedure ⇐394

Agriculture ⇐2

While the Administrative Procedure Act does exempt from the formal notice requirement those situations where persons subject to the proposed agency regulations are named and either personally served or otherwise have actual notice thereof in accordance with law, that exception was plainly inapplicable to the United States Department of Agriculture's promulgation of allotment regulations for the food stamp program. 5 U.S.C.A. § 553(b); Food Stamp Act of 1964, §§ 2–15, 7 U.S.C.A. §§ 2011–2025.

6. Administrative Law and Procedure ⇐395

Only publication in the Federal Register meets the Administrative Procedure Act requirement of constructive notice to persons subject to proposed agency regulations. 5 U.S.C.A. § 553(b).

7. Administrative Law and Procedure ⇐397

Agriculture ⇐2

Affidavits of two officials of the United States Department of Agriculture, offered in suit brought by members of low income households challenging the coupons allotment system established by the USDA to implement Food Stamp Act directive that food stamp recipients be given an opportunity to obtain a nutritionally adequate diet, did not provide the equivalent of the basis and purpose statement required by the Administrative Procedure Act as a condition precedent to the promulgation of regulations. 5 U.S.C.A. § 553.

8. Administrative Law and Procedure ⇐741

Litigation affidavits are an unacceptable basis for appellate review of agency decision-making.

9. Administrative Law and Procedure ⇐395

Basis and purpose statement, which the Administrative Procedure Act requires an agency to provide prior to the promulgation of proposed rules or regulations, is not intended to be an abstract explanation addressed to an imaginary

complaint but is intended, rather, to respond in a reasoned manner to the comments received, to explain how the agency resolved the significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule. 5 U.S.C.A. § 553.

10. Administrative Law and Procedure ⇐676

In an informal rule-making case, the "whole record," which the Administrative Procedure Act requires the reviewing court to review in measuring the validity of the agency action, is comprised of the comments received, hearings held, if any, and the basis and purpose statement. 5 U.S.C.A. § 706.

See publication Words and Phrases for other judicial constructions and definitions.

11. Administrative Law and Procedure ⇐395

Agriculture ⇐2

Secretary of Agriculture failed to comply with procedural command of the Administrative Procedure Act in promulgating allotment regulations for the food stamp program, and that failure could not be cured by litigation affidavits because, as post hoc rationalizations, they were unacceptable substitutes for a contemporaneous basis and purpose statement and because they did not provide a "whole record" to review; accordingly, the regulations were invalid as promulgated. 5 U.S.C.A. § 553; Food Stamp Act of 1964, §§ 2–15, 4(a), 5(a), 7(a), 7 U.S.C.A. §§ 2011–2025, 2013(a), 2014(a), 2016(a).

12. Agriculture ⇐2

Whether the "Economy Food Plan" provides the basis for a nutritionally adequate diet, for food stamp purposes, is plainly a factual question within the expertise of the Secretary of Agriculture. Food Stamp Act of 1964, § 4(a), 7 U.S.C.A. § 2013(a).

13. Agriculture ⇐2

Once the Secretary of Agriculture determines what constitutes a nutritionally adequate diet, any distribution mechanism must necessarily comport with the demands of the Food Stamp Act. Food Stamp Act, 1964, §§ 2–15, 4(a), 7 U.S.C.A. §§ 2011–2025, 2013(a).

14. Agriculture ⇐2

Food Stamp Act requires the Secretary of Agriculture to distribute food stamp coupons in such a way that all, or at least virtually all, recipients are given the "opportunity to obtain a nutritionally adequate diet". Food Stamp Act of 1964, § 4(a), 7 U.S.C.A. § 2013(a).

15. Agriculture ⇐2

1971 amendments to the Food Stamp Act marked a major shift in the policy of the Act, a shift from supplementing the diets of low-income households to guaranteeing those households the opportunity for an adequate diet; Congress plainly intended the 1971 amendments to assure that no eligible family need go malnourished. Food Stamp Act of 1964, § 4(a), 7 U.S.C.A. § 2013(a).

16. Agriculture ⇐2

While there is room for administrative convenience and necessity in administering the food stamp program, that does not justify automatically ignoring generalized, easily quantified, and easily verified differences among recipients under the rubric of administrative necessity; accordingly, an averaging system can be sustained only if the Secretary of Agriculture can show that such a system will deliver coupons to substantially all recipients sufficient to allow them to purchase a nutritionally adequate diet; and if such an "efficient" system does

not meet this test, the Secretary must individualize his computations to the extent necessary to achieve that result, or increase the amount of the "average" allotment. Food Stamp Act of 1964, § 4(a), 7 U.S.C.A. § 2013(a).

Appeal from the United States District Court for the District of Columbia (D.C.Civil Action No. 2553-71).

Ronald F. Pollack, New York City, with whom Roger A. Schwartz, New York City, and John R. Kramer, Washington, D. C., were on the brief, for appellants.

Raymond J. Coughlan, Jr., Asst. U. S. Atty., with whom Earl J. Silbert, U. S. Atty., and John A. Terry, Robert M. Werdig, Jr., and David G. Larimer, Asst. U. S. Attys., were on the brief, for appellees.

Before WRIGHT, McGOWAN and WILKEY, Circuit Judges.

Opinion for the court filed by Circuit Judge WRIGHT.

Statement concurring in the result and in Parts I and II of the court's opinion filed by Circuit Judge WILKEY.

J. SKELLY WRIGHT, Circuit Judge:

Plaintiffs-appellants challenge the coupon allotment system established by the United States Department of Agriculture (USDA) to implement the directive of the Food Stamp Act, 7 U.S.C. §§ 2011–2025, that food stamp recipients be given "an opportunity to obtain a nutritionally adequate diet * * *." *Id.* § 2013(a). *See also id.* §§ 2011, 2014(a), 2016(a). We find that the Secretary of Agriculture violated the procedural requirements of Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970), in promulgating the coupon allotment system, that the system is therefore void as promulgated, and that the case must be remanded to the Secretary for new proceedings.

I

The Food Stamp Act (the Act) was first passed in 1964. Its purposes were to distribute the agricultural surpluses of this nation in a beneficial manner, to safeguard the health and well-being of our citizens, and to raise the level of nutrition among low-income households. 7 U.S.C. § 2011 (1964). The Act allows eligible recipients to purchase food stamps (coupons) at prices significantly below their face value. The stamps, in turn, may be used at face value to purchase food at certain retail stores. The cost of the coupons for each household is variable; the Act directs that it "shall represent a reasonable investment on the part of the household, but in no event more than 30 per centum of the household's income * * *." 7 U.S.C. § 2016(b). The original Act directed the Secretary of Agriculture (the Secretary) to administer the program so that "eligible households * * * shall be provided with an opportunity *more nearly* to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment * * *." 7 U.S.C. § 2013(a) (1964) (emphasis added). In 1971, however, the Act was amended and this language was significantly altered. The italicized words "more nearly" were deleted from the Act, so that the Secretary's duty became to provide food stamp recipients "with an opportunity to obtain a nutritionally adequate diet * * *." 7 U.S.C. § 2013(a). *See also id.* §§ 2011, 2014(a), 2016(a). Essentially, it is the effect of this change that is here at issue.

Following the 1971 amendments, the Secretary published notice of a proposed

rule-making, 36 Fed.Reg. 7240 (1971), inviting comments from interested parties. New regulations, all dealing with the administration of the program, not with the size of the coupon allotments, were issued on July 29, 1971. *Id.* at 14102–14117. New coupon allotments were issued on April 16 and 17, *id.* at 7273, 7320–7321, and reissued in slightly revised form on July 29, 1971. *Id.* at 14118–14120. The coupon allotment system was based on the cost to a hypothetical family of four[1] of the so-called Economy Food Plan, the least costly of five "family food plans" developed by USDA.[2] The allotment for this hypothetical family was $108 per month, with allotments ranging from $32 per month for a family of one person to $180 per month for a family of eight persons. For each person over eight $16 was added to the monthly allotment.[3] *Id.* at 14118. The allotments thus reflected the economies of scale that would benefit larger households.

Plaintiffs-appellants began this litigation in December 1971, seeking declaratory and injunctive relief because of the Secretary's alleged violations of the Food Stamp Act. The individual appellants are members of nine low-income households, all of which receive food stamps. They sue on behalf of themselves and others similarly situated. The other appellants are the City of New York, the Commonwealth of Pennsylvania, and the National Welfare Rights Organization and its affiliates. In District Court appellants charged the Secretary was violating the Act in two ways:[4] (1) the Secretary's Economy Food Plan allegedly did not provide a nutritionally adequate diet and so its use violated the Act; and (2) the allotment system, because it was based on an average family and on average food prices and preferences, and because it did not continually reflect the current cost of food, did not provide all food stamp recipients with the opportunity to purchase even the Economy Food Plan. Complaint, ¶¶ 6 & 9, App. 9a–11a. In addition, appellants sought a preliminary injunction to prevent implementation of the new coupon allotments because they raised the cost of the coupons significantly, increasing the burden on low-income families. This request for preliminary relief was withdrawn when USDA rolled back its price increases on January 26, 1972. 37 Fed.Reg. 1180.

On April 7, 1972 USDA submitted, with supporting documents, a motion to dismiss or, in the alternative, for summary judgment. App. 113a. The District Court granted appellees' motion for sum-

1. The hypothetical family consists of a man and a woman, 20–35 years of age, a child 6–9 years of age, and a boy 9–12 years of age. Deposition of Dr. Robert L. Rizek at 112, Appendix (App.) at 167a. The composition of the family is extremely important because the amount, and kind, of food necessary to provide a nutritionally adequate diet for an individual varies dramatically according to the individual's age, sex, health, and physical activity. App. 267a.

2. The five plans are economy, low-cost, low-cost for families who are high consumers of cereal products, moderate-cost, and liberal. Affidavit of H. Rex Thomas, App. 93a.

3. The allotment figures are adjusted semi-annually. The current figures allow $46 for a family of one person, $154 for a family of four, and $266 for a family of eight. For each person over eight $22 is added to the monthly allotment. 39 Fed.Reg. 40520–40521.

4. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1337, 1361 (1970), under 5 U.S.C. § 702 (1970), and under 11 D.C.Code § 521 (1973). *See* Peoples v. United States Department of Agriculture, 138 U.S.App.D.C. 291, 294, 427 F.2d 561, 564 (1970).

mary judgment on July 7, 1972, holding that the Secretary's price rollback had mooted the controversy. App. 251a–252a. On appeal, this court reversed the District Court and remanded the case for further proceedings. Rodway v. United States Department of Agriculture, 157 U.S.App.D.C. 133, 482 F.2d 722 (1973). We held:

> While the rollback in the price increases for stamps removed this cause of complaint and rendered this issue moot, it did not alter or render moot the more substantial claim that the allotment levels established by USDA failed to satisfy the requirements of the Act.

157 U.S.App.D.C. at 137, 482 F.2d at 726.

On remand, the District Court sought to narrow the issues so as to permit a final adjudication. Thereupon, appellants submitted a motion for partial summary judgment, App. 273a, accompanied by a statement of material facts not in dispute, App. 276a–292a, and a statement of genuine issues, App. 293a–298a. USDA filed a supplemental memorandum in support of its motion for summary judgment. App. 299a–301a. Without hearing oral argument, the District Court, on December 12, 1973, granted USDA's motion for summary judgment and denied appellants' motion for partial summary judgment. Rodway v. United States Department of Agriculture, D.D.C., 369 F.Supp. 1094 (1973). Appellants again appealed to this court.

At oral argument it became apparent that the Secretary's compliance with the procedural requirements of the APA in promulgating the allotment regulations was a substantial issue in this case, although it had not been raised in the District Court or in the prior appeal to this court. On their face the regulations had seemingly been promulgated without notice, solicitation of comments, [illegible] suance of a basis and purpose statement. *See* 5 U.S.C. § 553. Accordingly, we ordered the parties to respond in writing to a list of questions probing the consequences of this apparent omission.[5] Now the parties have provided their answers. We find that the Secretary has indeed failed to comply with the requirements of the APA, and that the failure is fatal to the asserted validity of the allotment regulations.

II

[1] All parties agree that the APA would not, by its own terms, govern the issuance of the allotment regulations. Expressly exempted from the procedural requirements of Section 4 are any matters "relating to • • • public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). The food stamp program would appear to be a matter relating to public "grants" or "benefits," thereby exempting rules relating to the program from the APA. *See* Rodriguez v. Swank, N.D.Ill., 318 F.Supp. 289 (1970), affirmed, 403 U.S. 901, 91 S.Ct. 2202, 29 L.Ed.2d 677 (1971) (A.F.D.C. benefits excluded). *See generally* Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, 118 U.Pa.L.Rev. 540 (1970).

[2] On July 24, 1971, however, as a result of a recommendation of the Administrative Conference of the United States, USDA promulgated a regulation making the procedural requirements of Section 4 of the APA applicable to all of its rule-making relating to "public property, loans, grants, benefits, or contracts." The regulation was effective immediately. 36 Fed.Reg. 13804. It is, of course, well settled that validly issued administrative regulations have the force and effect of law. *See, e. g.*, Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); Vitarelli v. Seaton, 359 U.S. 535, 539–540, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). Thus the regulation fully bound the Secretary to comply thereafter with the procedural demands of the APA. The allotment regulations here at issue were promulgated five days later, on July 29, 1971. 36 Fed.Reg. 14118–14120.

[3] USDA does not argue that it was not bound by the regulation of July 24, 1971,[6] but rather suggests that it has indeed complied fully with the APA in its promulgation of the allotment procedures. However, even a superficial examination of the challenged regulations and USDA's purported manner of compliance shows this to be untrue. The APA requires an agency to provide the public with notice of proposed rules, an opportunity to comment upon them, and a "a concise general statement of their basis and purpose" that justifies the rule in light of the comments received. 5 U.S.C. § 553. In promulgating its allotment regulations, USDA followed none of these requirements.

[4] To show its compliance with the APA, USDA points to the procedures surrounding its adoption of various rules for the administration of the food stamp program. For these rules, there was notice soliciting comments published on April 16, 1971, 36 Fed.Reg. 7240, final rules incorporating changes suggested by comments received published on July 29, 1971, *id.* at 14102–14117, and a subsequent analysis of the comments received published on October 16, 1971, *id.* at 20145–20148. Nonetheless, the answer to USDA's argument is short: however procedurally proper the adoption of these rules, they did not concern in any way the allotment regulations that are the subject of this lawsuit. The proposed rule-making dealt with a vast number of rules necessary for administration of the program. Proposed rules outlined the participation of state agencies, individual households, wholesale and retail food stores, and banks. Plans were proposed for emergency food assistance for disaster victims, and procedures were outlined for adminstrative and judicial review of USDA actions. But of the basic ingredient of the program, the allotments system, there was not a word. *See* 36 Fed.Reg. 7240–7254. Admittedly, the notice was framed broadly:

5. The questions were:
   1. Was the analysis promised by the Secretary in 36 Fed.Reg. 14102 (1971) made and published?
   2. If made and published, does the analysis meet the requirements of the Administrative Procedure Act, 5 U.S.C. § 553(d) (1970), for a statement of reasons? *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).
   3. If such an analysis was not issued, are the regulations therefore invalid? Can the subsequent affidavits taken of officials of the Department of Agriculture in the District Court proceeding provide the necessary statement of reasons?
   4. If the analysis was not made and published, what effect does this fact have on subsequent regulations based on the regulations published at 36 Fed.Reg. 14102?

   Order, March 6, 1975.

6. USDA does assert that the regulation does not apply to its rule-making proceedings in the spring of 1971, an assertion with which we have no dispute but which is essentially irrelevant to the validity of regulations issued after July 24, 1971. *See* USDA Supplemental Memorandum at 2 n.1.

> Notice is hereby given that the [USDA] intends to revise the regulations governing the operation of the Food Stamp Program for the purpose of incorporating the applicable provisions of [the 1971 amendments].

Id. at 7240. The provisions that followed, however, were only the proposed administrative regulations described above. Such notice is insufficient to include the allotment system by inference. Section 4 of the APA is clear in its demands: the notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The notice appearing at 36 Fed.Reg. 7240 does not meet this requirement so far as the allotment system is concerned.[7]

[5, 6] USDA essentially admits as much by arguing in the alternative that notice was unnecessary because the legislative history of the 1971 amendments makes clear that Congress knew the Secretary would use the Economy Food Plan and family of four averaging system. Thus

> [i]t is clear that all interested persons were on actual notice, without the formal issuance of a Notice *in haec verba*, of the Secretary's intention in this regard. See 5 U.S.C. § 553(b).

USDA Supplemental Memorandum at 4. While 5 U.S.C. § 553(b) does exempt from the formal notice requirement situations where "persons subject [to the proposed regulations] are named and either personally served or otherwise have actual notice thereof in accordance with law," the exception plainly does not apply to this case. Appellants, of course, were named nowhere. Moreover, they did not have actual notice. Even if the legislative history fully supported the Secretary's view of the law, it cannot seriously be asserted that the congressional debates provided more than constructive notice to appellants. Only publication in the *Federal Register* meets the APA requirement of constructive notice. If the notice requirement of the APA could be avoided by reference to inferential discussions obscurely placed throughout various federal publications, much of the salutory purpose of the procedural rule-making requirements of the APA would be vitiated. Absent actual notice, the public should be held accountable only for notice plainly set forth in the *Federal Register*. By this standard, USDA's asserted notice must fail.

Having failed to comply with the first procedural requirement of informal rule-making, USDA in due course failed to comply with the other two. Since there was no notice, there was no solicitation of comments. Unremarkably, no comments on the allotment regulations were received. And, when the revised allotment figures were promulgated on July 29, 1971, they were accompanied by no basis and purpose statement. 36 Fed. Reg. 14118–14120. USDA relies on the analysis that finally was produced for those administrative regulations that were a product of orderly rule-making. But that analysis dealt, again unremarkably, only with the comments received concerning those regulations.[8] See 36

7. The same day the notice appeared, USDA published elsewhere in the *Federal Register* allotment regulations substantially identical with those here at issue. 36 Fed.Reg. 7273. *See also id.* at 7320–7321. These regulations cannot, however, be construed as notice of the subsequent rules since they were effective in their own right upon publication.

8. One sentence in the published "analysis" appears generally to concern the allotment regulations:

Fed.Reg. 20145–20148. Thus, as for the allotment regulations, the APA procedures were ignored from start to finish.[9]

[7, 8] While not conceding the invalidity of its procedures, USDA argues that we may look beyond the administrative record (or nonrecord) to find the justification for its allotment regulations. Specifically the Department suggests that the affidavits of two USDA officials offered to the District Court in this litigation may provide the equivalent of a basis and purpose statement. Without passing on whether the affidavits contain sufficient explanation to pass muster as a basis and purpose statement,[10] we find them inadequate for two more fundamental reasons. First, courts have traditionally looked with hostility upon explanations of agency officials submitted in affidavit form during the course of litigation. These "*post hoc* rationalizations" are typically found to be an inadequate basis for review. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Burlington Truck Lines v. United States, 371 U.S. 156, 168–169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); SEC v. Chenery Corp., 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Appellees rely on two cases where exceptions to this general rule were made. These cases, however, only show why an exception would be inappropriate in this case and bring us to the second reason for refusing to accept the affidavits as a substitute basis and purpose statement. In Citizens to Preserve Overton Park v. Volpe, *supra*, the Supreme Court did rec-

> No changes were made in the basis of issuance tables in view of the provisions of the Food Stamp Act and in order to provide for work incentives and maintain consistency with the proposed family assistance program.

36 Fed.Reg. 20148. Even if that sentence dealt fully with the substance of appellants' complaint, which it in fact addresses only inferentially, it is not a sufficient statement of basis and purpose to show that the agency engaged in reasoned decision-making or to provide an adequate basis for appellate review. *See* Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971). *See also* Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L.Rev. 375, 381 (1974). And, of course, even if the sentence were fully adequate it would not remedy the deficiencies caused by the absence of notice and comment rule-making.

9. While these regulations were substantially identical with regulations published a few months earlier, see note 7, *supra*, at a time when the APA requirements did not apply to the food stamp program, USDA has not suggested that this prior publication somehow relieves the regulations here at issue of the notice and comment procedures of the APA. Indeed, it could not so argue, since it is apparent on the face of its rule announcing future compliance with the APA that all rules promulgated after July 24, 1971 would have to meet the APA standards. *See* 36 Fed.Reg. 13804. Since the challenged regulations were issued on July 29, 1971, they plainly fall within the terms of USDA's self-imposed rule.

This is not to suggest, however, that once allotment regulations are promulgated in compliance with APA procedures, those procedures must be followed for every semi-annual allotment adjustment mandated by the Act. 7 U.S.C. § 2016(a). So long as the adjustment is purely a statistical calculation involving no change in underlying policy, the Secretary may properly exempt those proceedings from the notice and comment requirements if he can

> for good cause [find] * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B).

10. Appellants hotly contest the sufficiency of the affidavits on this ground, as well as on the two mentioned in text. Appellants' Responses to Court's Questions and Supporting Memorandum of Law at 31–49.

ognize the possibility that the District Court could require the Secretary of Transportation to explain in court his reasons for approving the routing of a highway through a city park. But in *Overton Park* there was a full administrative record; only the Secretary's explanation was lacking.[11] In Aguayo v. Richardson, 2 Cir., 473 F.2d 1090, 1103 (1973), the procedural requirements of the APA did not apply, so no administrative record was available. The Second Circuit was forced to make do with the inferences from the papers on which the Secretary of Health, Education, and Welfare had acted and with "the largely unhelpful documents prepared specifically for this litigation." *Id.* (footnote omitted).[12] Here, unlike *Overton Park*, there is no full administrative record on which to base review, but, unlike *Aguayo*, an administrative record is required. Thus we see no reason to depart from the well settled rule that litigation affidavits are an unacceptable basis for appellate review of agency decision-making.

[9, 10] The absence of an administrative record has significance apart from the doubt it casts upon after-the-fact explanations. Even if the proffered affidavits did provide an acceptable explanation of the Secretary's decision, it would be an explanation of a decision reached without the comments of interested parties. Not only would appellants' comments have been ignored, but the comments of those who might have responded to a general published notice would have been bypassed as well. The basis and purpose statement is not intended to be an abstract explanation addressed to imaginary complaints. Rather, its purpose is, at least in part, to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.[13] Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); Portland Cement Assn v. Ruckelshaus, 158 U.S.App.D.C. 308, 486 F.2d 375 (1973). The basis and purpose statement is inextricably intertwined with the receipt of comments. Thus we think the Secretary's failure to solicit comments on his allotment regulations is, by itself, fatal to their validity. His present explanations cannot address comments never received. Moreover, the absence of comments makes the appellate function impossible. The APA requires the reviewing court to "review the whole record" in measuring the validity of agency action. 5 U.S.C. § 706 (1970). The whole record in an informal rule-making case is comprised of comments received, hearings held, if any, and the basis and purpose statement. In this case, there is plainly no whole record to review and the District Court could not perform its appellate function.[14]

[11] In sum, the Secretary failed to comply with the procedural command of the APA in promulgating allotment regulations for the food stamp program. This failure cannot be cured by litigation affidavits because, as *post hoc* rationalizations, they are unacceptable substitutes for a contemporaneous basis and purpose statement and because they do not provide a "whole record" to review. Accordingly, we find the regulations are invalidly promulgated.[15] This case must be reversed and remanded to the District Court, which in turn must return it to the Secretary for a rule-making proceeding in compliance with the APA.

In so holding, however, we are mindful of the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets. Thus we do not order the r ulations vacated pending the rule-m ing proceedings. Rather, they must c tinue in effect, and the Secretary m continue to make the cost-of-living justments mandated by the Act, 7 U.S § 2016(a), until validly promulgated ulations can take their place. How we think th transition should o with expedi . In matters as vita basic nutrition there is no excuse for lay, especially when this litigation already dragged on for over three ye Accordingly, we order the Secretar complete the new rule-making pro within 120 days of the issuance of opinion.

III

[12] Since this case must be rema ed for a new rule-making proceeding, have no occasion to address the subst tive validity of the present regulati Whether the Economy Food Plan vides the basis for a nutritionally a quate diet is plainly a factual quest within the Secretary's expertise. W we can review his ultimate determ tion to see whether it is "arbitrary pricious, an abuse of discretion, or o wise not in accordance with law 5 U.S.C. § 706(1)(A), we can offer hi guidance at this point in making

11. The Court did note that "[s]uch an explanation will, to some extent, be a '*post hoc* rationalization' and thus must be viewed critically." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 826 (1971). Moreover, the Court rejected reliance upon litigation affidavits such as are offered by appellees here. *Id.* at 419, 91 S.Ct. 814.

12. From the phrase quoted above, the court dropped the following footnote:

> As noted in *Overton Park*, • • • such affidavits are "merely 'post hoc' rationalizations" for administrative action, and cannot be given great weight.

Aguayo v. Richardson, 2 Cir., 473 F.2d 1090, 1103 n.20 (1973).

13. This purpose is patent on the face of the statute:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. *After consideration of the relevant matter presented*, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. • • •

5 U.S.C. § 553(c) (emphasis added).

14. In this circuit the District Court has jurisdiction under the APA to review agency action when "there is no other adequate remedy in a court • • •." 5 U.S.C. § 704 (1970). *See* Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). Appellants asserted this provision as a basis for jurisdiction, *see* note 4 *supra*, and, since the Food Stamp Act does not otherwise provide for judicial review of the Secretary's rule-making activities, cf. 7 U.S.C. § 2022, the District Court was consequently empowered by the APA to review the rules here at issue.

15. Under somewhat similar circumstance Sixth Circuit recently found agency rule ing unlawful under the APA, holding:

> The Administrator built no record in proving or disapproving the state plans took no comments, data, or other evid from interested parties, nor did he artic the basis for his actions. This failure travenes the explicit dictates of Section of the APA and renders meaningless th dicial review provisions of Section 70 Buckeye Power, Inc. v. EPA, 6 Cir., 481 162, 171 (1973).

initial determination.[16] On the other hand, appellants' second claim—that the Secretary's allotment system, including use of the hypothetical family of four, is invalid because it does not provide all recipients with the opportunity to purchase a nutritionally adequate diet—presents mixed questions of fact and law. We think it will help expedite the administrative process to address the questions of law at this time. Those questions are assuredly before us, having been properly brought to the District Court, decided there, and now brought to this court by appellants. And resolution of this issue now will provide substantial guidance to the Secretary as he attempts to formulate new regulations.

[13, 14] Once the Secretary determines what constitutes a nutritionally adequate diet, the Economy Food Plan or something else, any distribution mechanism must necessarily comport with the demands of the Act. We think it plain that the Food Stamp Act requires the Secretary to distribute the food stamp coupons in such a way that all, or at least virtually all, recipients are given the "opportunity to obtain a nutritionally adequate diet * * *." 7 U.S.C. § 2013(a). We reach this conclusion from the face of the statute itself, and from its legislative history.

The statute offers no suggestion that any distribution system that offered significant numbers of recipients less than that necessary to purchase a nutritionally adequate diet would be acceptable. Congress found substantial malnutrition in America and sought to alleviate it. 7 U.S.C. § 2011. The food stamp program was designed to permit "low-income households to purchase a nutritionally adequate diet through normal channels of trade." *Id.* That the program would offer recipients this opportunity is repeated again and again throughout the Act. *Id.* §§ 2013(a), 2014(a), 2016(a). We find no suggestion on the face of the Act, or any reason to impute one, that the opportunity is not to be offered to *all* eligible recipients.[17]

This conclusion is bolstered by reference to the legislative history. Most significant is the change, mentioned earlier, from the promise of the 1964 Act, "an opportunity *more nearly* to obtain a nutritionally adequate diet" to that of the 1971 amendments, "an opportunity to obtain a nutritionally adequate diet." At the same time, the purpose of the Act was changed from "raising levels of nutrition" to enabling eligible households "to purchase a nutritionally adequate diet." *See* H.R.Rep. No. 91-1402, 91st Cong., 2d Sess., 14 (1970), 1970 U.S.Code Cong. & Admin.News, p. 6025. The changes were the result of an Administration proposal. *See* 115 Cong.Rec. 11669 (1969) (President's message). In support of the changes, then Secretary of Agriculture Hardin testified before a House committee:

> In short, we are proposing that the food stamp program be revised so that stamp purchase requirements are realistic—so that they encourage the poor to purchase a nutritious diet rather than discourage their participation in this program. Under the present law, the food stamp program is designed only to help participants improve their diet. *There is no assurance that a participating family can meet its minimum nutritional needs. We are proposing a program that will allow participants to obtain at least a nutritionally adequate diet.*

Hearings on H.R. 12430 and H.R. 12222 Before the House Committee on Agriculture, 91st Cong., 1st Sess., Serial Q, Part 1, at 8 (1969) (emphasis added). Secretary Hardin also testified before a Senate Committee:

> As the President stated in his message, the total food stamp allotment shall be equivalent to the cost of [a] nutritionally complete diet. * * * This would represent a new commitment on the part of the Congress and the Executive. *It makes of the food stamp program what it should be—an instrument to assure an adequate diet to all our low-income families.*
>
> This has not been true in the past. The purchase requirement was designed to maintain a family's normal level of food expenditure but the value of the bonus coupons was not sufficient to assure *all* food stamp families that, in total, they would have sufficient food purchasing power to buy an adequate diet.

Hearings on S. 6, S. 339, S. 1608, S. 1864, and S. 2014 Before the Senate Committee on Agriculture and Forestry, 91st Cong., 1st Sess., 389 (1969) (emphasis added). The Administration's proposed deletion of the phrase "more nearly" was accepted without opposition; congressional debate centered on whether offering recipients merely an "opportunity" to purchase a nutritionally adequate diet was itself sufficient.[18] While the Senate version of the 1971 amendments adopted a more substantial base for allotments, the House stayed with the Administration proposal, and the Senate finally agreed at conference. In explaining to the Senate why the conferees had settled

16. We do note, however, that it is an insufficient basis for that determination for the Secretary to assert that Congress knew he would utilize the Plan when it passed the 1971 amendments. Congress ordered the opportunity to achieve a "nutritionally adequate diet," not the opportunity to purchase the Economy Food Plan. While there are frequent references to the Plan in the legislative history, Congress was acting only on the Secretary's representations that the Plan would be the basis for a nutritionally adequate diet. It did not attempt to evaluate those representations, and it did not incorporate them into the statutory standard. Thus the Secretary must find support for the Plan in fact, not in the legislative history. *Cf.* note 19 *infra*.

17. *See, e. g.*, 7 U.S.C. § 2016(a):

> The face value of the coupon allotment which State agencies shall be authorized to issue to any households certified as eligible to participate in the food stamp program shall be in such amount as the Secretary determines to be the cost of a nutritionally adequate diet * * *.

(Emphasis added.) The italicized word "any" was added, without comment, to this provision by the 1971 amendments. *See* H.R.Rep. No. 91-1402, 91st Cong., 2d Sess., 22 (1970); S.Rep. No. 91-292, 91st Cong., 1st Sess., 14 (1969).

18. Congress debated whether merely giving eligible households the *opportunity* to purchase a nutritionally adequate diet by issuance of coupons representing the dollar value of that diet was meaningful when, it was claimed, only a trained dietician could use that amount to purchase such a diet. Untrained shoppers would spend substantially more to purchase a diet of equal nutritional value, thus making the proposed allotments insufficient for the needs of most recipients. The Senate version of the Act would have based allotments on the cost of USDA's low-cost food plan, *see* note 2 *supra*, thereby providing more leeway for consumer ignorance. *See* Senate Hearings on S. 6, S. 339, S. 1608, S. 1864, and S. 2014 Before the Senate Committee on Agriculture and Forestry, 91st Cong., 1st Sess., 269 (1969) (supplemental statement of Sen. McGovern); 115 Cong.Rec. 26852 (1969) (statement of Sen. McGovern); H.R.Rep. No. 91-1402, *supra* note 17, at 31 (dissenting views of Reps. Foley and Lowenstein); 116 Cong.Rec. 42006 (1970) (statement of Rep. Foley); *id.* at 44164 (statement of Rep. Poage).

on the House version, Senator Miller made it quite clear that a nutritious diet for all recipients was intended, no matter what the cost:

> The conference report contains the language of the House bill, which is simply that an adequate and nutritious diet will be provided for. It so happens that the way the Department of Agriculture is administering this program today, an adequate and nutritious diet for a family of four is deemed to cost around $106 a month. But, as the House conferees pointed out, *they did not care whether it cost $50, $100, or $150; whatever it cost must provide for an adequate and nutritious diet.* • • •
>
> • • • • • • •
>
> I attempted to get the two sides together by suggesting that we split the difference [between the House and Senate versions] and go to about $121 as our starting point, and I thought at one time that the House conferees were going to agree, but finally they refused to agree, and *they said the adequate and nutritious diet provision in their bill meant exactly what it said, nothing more and nothing less,* and refused to budge on it.

19. After explaining the House-Senate compromise in the language quoted above, Sen. Miller added:

> [B]ut I will say that if the Department of Agriculture does not administer this program in a way which meets not only the letter but the spirit of the language "adequate and nutritious[,]" I shall be happy to join with anyone in trying to do something about that, because it will be frustrating the clearly expressed intention of Congress. . . .

116 Cong.Rec. 44441 (1970).

20. The District Court upheld the present allotment system as follows:

> It may be, as plaintiffs allege, every household because of its particular composition, will not receive under the program a diet which is exactly equivalent in nutritional adequacy to the diet which some other household of similar size would receive. Such disparities, as plaintiffs allege, may result from the age, sex, health and physical activity of the household members. However, in the area of economics and social welfare, a classification does not fail on equal protection grounds because it is imperfect. It does not offend the Constitution simply because "the classification is not made with mathematical nicety or because in practice it results in some inequality." . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).
>
> Rodway v. United States Department of Agriculture, D.D.C., 369 F.Supp. 1094, 1098 (1973).

While we do not quarrel with the District Court's view of the equal protection clause, we must observe that this case concerns statutory construction, not constitutional interpretation. That the allotment regulations may be constitutional does not, of course, imply that they comport with the dictates of the Food Stamp Act.

[15] We are thus convinced by the language of the statute and by the legislative history that the 1971 amendments marked a major shift in the policy of the Food Stamp Act, a shift from supplementing the diets of low-income households to *guaranteeing* those households the opportunity for an adequate diet. Congress plainly intended the 1971 amendments to assure that no eligible family need go malnourished; the Government would provide all the opportunity to be healthfully fed. Manifestly, that congressional intent is frustrated if the food stamp program is administered in such a way that a substantial number of eligible households do not receive sufficient coupons to purchase what the Secretary determines to be a nutritionally adequate diet.[19] For a family that needs a loaf of bread, the offer of a slice is poor comfort. We think such an administrative system would violate the Act.

While we have no need to determine whether the present administrative system, based on the cost of a nutritionally adequate diet for a hypothetical family of four, complies with the Act,[20] we shall

outline the showing necessary to support such a system.[21] At oral argument USDA conceded that the present system results in the individual appellants receiving substantially less than that necessary for them to purchase even the Economy Food Plan.[22] In part this is so because, by USDA's own figures, the cost (and composition) of a nutritionally adequate diet varies according to an individual's age and sex.[23] The allotment regulations, however, do not consider age and sex at all. Rather they calculate the cost of the Plan for a family composed of two adults, ages 20–35, one child, age 6–9, and one boy, age 9–12. Deposition of Dr. Robert L. Rizek at 112, App. 167a. Thereafter, this cost is adjusted only for the *number* of persons in each eligible household, without regard to its individual composition. Thus every four-person household receiving food stamps receives the same amount each month—that necessary to feed the hypothetical family of four—although some households need substantially more than the hypothetical family of four and some need substantially less.

USDA's failure to account for the composition of each recipient household by age and sex is not the only reason why appellants receive less than they need to purchase a nutritionally adequate diet. The recipient's health and the amount of his daily physical activity also influence the cost to him of a nutritionally adequate diet. The fact that, in accordance with the Act, 7 U.S.C. § 2016(a), the Secretary adjusts the allotment figures for inflation only twice a year, and in so doing uses cost of food data current six months prior to the effective date of the new allotment schedules, means that the actual cost of the Economy Food Plan is frequently higher than the allotment even for the hypothetical family of four. Moreover, appellants are all from Northeastern states where the cost of food is higher than the national average, which the Secretary uses in pricing the Economy Food Plan.

21. USDA appears to argue that a showing is unnecessary because the legislative history of the Food Stamp Act demonstrates congressional approval of the four-person family averaging system. Brief of appellee USDA at 21. *Cf.* note 16 *supra*. We disagree. Undoubtedly, Congress knew the Secretary was using the hypothetical family of four. *See, e.g.*, H.R. Rep. No. 91-1793, 91st Cong., 2d Sess., 8 (1970); S.Rep. No. 91-202, *supra* note 17, at 25 (individual views of Sen. McGovern). But there is no indication that Congress ever became aware of the issues raised in this lawsuit; rather, it simply used figures for a family of four, which were supplied by the Secretary and uncontested, as a basis for comparison of various food plans and levels of funding. The family of four is nowhere mentioned in the statute itself, and there is no suggestion in the legislative history that had Congress been aware of the effect of the Secretary's system it would have approved it. We think to defer to the inferences the Secretary draws from such scanty supportive material would be to disserve legislative intent, for we think the Congress intended nothing more in this regard than that its statute be followed.

22. *See* note 24 *infra*.

23. See note 23 on page 681.

23. The Secretary's own figures for various ages and sexes follow:

Cost of Food at Home Estimated for the Economy Food Plan [1]
September 1971, U. S. Average

Sex-age groups [2]	Cost for—	
	1 Week	1 Month
	Dollars	Dollars
FAMILIES		
Family of two, 20–35 years [3]	15.00	65.10
Family of two, 55–75 years [3]	12.30	53.40
Family of four, preschool children [4]	21.70	94.50
Family of four, school children [5]	25.30	109.70
INDIVIDUALS [6]		
Children, under 1 year	2.90	12.60
1–3 years	3.70	16.10
3–6 years	4.40	19.20
6–9 years	5.40	23.30
Girls, 9–12 years	6.10	26.50
12–15 years	6.80	29.30
15–20 years	6.90	29.90
Boys, 9–12 years	6.30	27.20
12–15 years	7.40	31.90
15–20 years	8.50	36.80
Women, 20–35 years	6.30	27.40
35–55 years	6.10	26.30
55–75 years	5.20	22.30
75 years and over	4.70	20.30
Pregnant	7.50	32.60
Nursing	8.30	36.00
Men, 20–35 years	7.30	31.80
35–55 years	6.80	29.50
55–75 years	6.00	26.20
75 years and over	5.60	24.40
Per person [7]	6.10	26.30

[1] Costs for the Economy Plan are estimated at 80 percent of the cost for the Low-cost Plan. Quantities of major food groups in these plans were published in *Family Economics Review*, October 1964. In estimating costs for the Low-cost Plan, selections of foods within groups and prices paid were based on these urban households with incomes of $2,000 to $2,999 surveyed in spring 1965. Survey prices were updated to the reporting period by the change in "Estimated Retail Food Prices by Cities" released by the Bureau of Labor Statistics.

[2] Persons of the first age listed up to but not including the second age.

[3] Ten percent added for family size adjustment.

[4] Man and woman, 20 to 35 years; children 1 to 3 and 3 to 6 years.

[5] Man and woman, 20 to 35 years; child 6 to 9; and boy 9 to 12 years.

[6] Costs given for persons in families of 4. For other size families, adjust thus: 1-person, add 20 percent; 2-person, add 10 percent; 3-person, add 5 percent; 5-person, subtract 5 percent; 6-or-more person, subtract 10 percent.

[7] Plan for an average person in the civilian population (1960).

App. 88½a.

[16] All this the Secretary concedes.[24] He defends the allotment system not on its accuracy but on the ground of administrative necessity.[25] He further suggests that appellants' allotments fall short because they are members of "un-

24. At oral argument USDA conceded that its administration of the food stamp system resulted, as of Aug. 1973, in the following discrepancies between the nutritional needs of appellants' households and their allotment under the present system:

Appellant and Household Size	Monthly Cost of Economy Food Plan	Monthly Coupon Allotment	Monthly Difference
Rodway (11)	$410.24	$248	$162.24
McKnight (11)	407.46	248	159.46
Hollis (4)	294.34	216	78.34
Robinson (3)	286.90	200	86.90
Butler (3)	276.64	200	76.64
Walker (3)	125.11	94	31.11
Angiletta (3)	281.60	200	81.60
McArthur (3)	129.75	94	35.75
James (7)	271.92	180	91.92

App. 234½a. Thus USDA concedes that appellants receive an average of 32% less than that necessary for them to have an opportunity to purchase what the Secretary determined to be a nutritionally adequate diet, an opportunity Congress guaranteed appellants in the Food Stamp Act.

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25. 12. It is not administratively practicable to provide for the determination of a coupon allotment for each household participating in the program on the basis of the actual composition of each household taking into consideration such factors as the age, health, sex, and degree of physical activity of each household member even though such factors to some degree affect the total nutritional needs of a household. To do so would require the obtaining and verification of substantial amounts of additional information from applicant households in order to certify their eligibility and more frequent recertifications, for example, at the birthday of each household member to insure that the changing ages were resulting in the appropriate increases or decreases in the household's coupon allotment. To this end, the Department has tried to reduce rather than add to, the complexity of the certification process and to simplify rather than complicate the judgments which must be made by certifying officials to insure that the certification process itself does not present a barrier to the participation of eligible households. Therefore, after reviewing available data on the typical composition of poverty families by age and sex, coupon allotments were established on the basis of household size alone, taking into account that large households should be able to buy food more economically than small households. The available data concerning such economies of scale, particularly for the largest households which participate in the program—some in excess of 15 members—are limited. Again to minimize the calculations for caseworkers, and thus speed up the certification process, the revised regulations allow the caseworker to quickly calculate the coupon allotment for the largest households by adding to the published allotment for an eight-person household the uniform amount of $18 for each member in the household in excess of eight. On the basis of the limited information available on the economies of scale, and the fact that large-size households typically contain many school-age children receiving school lunch benefits, I determined that these allotments are sufficient to provide a nutritionally adequate diet.

Affidavit of Richard E. Lyng, Assistant Secretary of Agriculture for Marketing and Consumer Services, App. 106a–107a.

tional families." Brief for appellee USDA at 21. We agree that there is room for administrative convenience and necessity in the administration of the food stamp program. The number of variables affecting the needs of individual recipients is, ultimately, infinite, and we certainly do not expect the Secretary to embark upon extensive metabolic examinations of each food stamp recipient to determine individual need. But we do not think that justifies automatically ignoring generalized, easily quantified, and easily verified differences among recipients under the rubric of administrative necessity.[26] The purposes of the Food Stamp Act—the health and well-being of our populace—are too important, and the legislative intent that those purposes be achieved for substantially all recipients too clear, for us to allow their administrative evisceration. We think that an averaging system such as that now used can be sustained only if the Secretary can show that such a system will deliver coupons to substantially all recipients sufficient to allow them to purchase a nutritionally adequate diet.[27] If such an "efficient" system does not meet this test, which we think is congressionally mandated, then the Secretary must individualize his computations to the extent necessary to achieve this result, or increase the amount of the "average" allotment so that virtually all recipients are swept within it. And, needless to say, whatever approach is utilized must be supported by the administrative record developed on remand.

Further than this we do not go. We express no view on what allotment system is to be preferred, or, should an individualized approach be used, how many variables should be accommodated. That is initially to be determined by the Secretary, and we think a proper determination must await the presentation of facts not now before us. But we stress that the Secretary must make an active inquiry into the facts and must take whatever steps are required to comply with the legislative mandate. The nation's poor and low-income families who are so dependent on the relief promised by the Food Stamp Act deserve no less.

Accordingly, this case is remanded to the District Court with instructions to return it to the Secretary for a new rule-making proceeding.

So ordered.

26. While USDA suggests that quantification of age and sex variables would require substantial amounts of additional data from recipient households and frequent and complex recertifications of households, *see* note 25 *supra*, we are not, at least in the absence of a factual record, immediately convinced. USDA already requires state agencies to certify eligible households as to the size and number of family members. 7 C.F.R. § 271.4 (1974). Typically, a household must be recertified every three months; no household may be certified for more than 12 months. *Id.* § 271.4(a)(4). To add to this the burden of certifying household members' ages and sexes does not seem to us intolerable. And as for the problem of constant recertification, upon which USDA places much emphasis, sex is unchanging, and the ages of all recipients can be adjusted administratively each year, so that no recertification is necessary.

The variables of inflation and the differential price of food in different parts of the country are already quantified by the Government itself. Adjustment for these figures in a system that works largely through individual state programs does not seem difficult.

The variables of health and individual physical activity may be more difficult to quantify in any efficient manner, but we would expect the Secretary on remand to inquire diligently into the significance of these variables, as well as any others of import raised by the comments, and the possibility of their quantification.

27. In such a case the Secretary must necessarily be able to show why appellants are members of "normal families." Brief for appellee USDA at 21.

WILKEY, Circuit Judge:

I concur in the result and in Parts I and II of the court's opinion. I respectfully suggest that Part III is dicta, and whether it is all helpful dicta may be problematical.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN ROWEN ET AL.,	*	
	*	
Plaintiffs,	*	
	*	CIVIL ACTION
v.	*	NO. 74-4895-S
	*	
PAUL PROVENCHER ET AL.,	*	
	*	
Defendants.	*	
	*	

MEMORANDUM AND ORDER

March 17, 1975

SKINNER, D.J.

In this Complaint the plaintiffs seek relief against the defendants for the loss that they have suffered because of the defendants' delay in processing their applications for food stamps under the federal Food Stamp Act of 1964, 7 U.S.C. §§2011 et seq. The parties have agreed to adjustments in the purchase price of food stamps to account for the denial of benefits during the period of delay, for those households which pay for their food stamps

There remains for consideration the claim of the plaintiffs who are members of so-called "0 purchase households," that is, households which pay nothing for their food stamps. For such households there can be no effective credit for the loss that they have suffered from the prior delay because they pay nothing anyway.

At the outset the Court must determine whether this case may be certified as a class action under Fed.R.Civ.P. 23. I find that the plaintiffs here satisfy the requirements of paragraphs (a) and (b)(2) of Rule 23.

It is clear that the plaintiffs, in suffering delay in the approval of their food stamps, have suffered a loss for which they are entitled to seek a remedy in this Court, and that the Court has the power to fashion an appropriate remedy. Bermudez v. U. S. Department of Agriculture et al., 490 F.2d 718 (C.A. D.C. 1973).

The plaintiffs claim redress in the form of money payments equivalent to the value of the food stamps to which they were entitled. They justify this claim on the basis that they have been obliged to use their other financial resources or, in some cases, to borrow money, to buy the food which they should have acquired through the food stamp program. This relief is not appropriate, however, because the funds appropriated under the Food Stamp Act are specifically earmarked for redemption of food stamps and not direct payments to qualified applicants. Such relief, furthermore, would convert this action into an action against the United States for a money judgment in violation of 28 U.S.C., Section 1346. The relief must be prospective.

On the representation of counsel that the allotment of food stamps does not satisfy the food requirements of even the "0 purchase households," and that additional food stamps would be of benefit to such households in the procurement of food, it is the opinion of the Court that the relief sought may best be granted in the form of additional allotments of food stamps to make up the amounts withheld because of delays in the processing of the applications. At the same time, however, the Court is anxious to avoid a distribution of food stamps in such amounts and at such times as would encourage traffic in food stamps for cash.

Accordingly, the Court orders the case set down for further hearing on Friday, March 21, at 2 P.M., for the purpose of developing a formula for the issuance of additional food stamps in such amounts and at such times as will minimize the chance of encouraging traffic in food stamps.

Walter Jay Krause
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HELEN ROWEN, et al., Plaintiffs v. PAUL PROVENCHER, et al., Defendants	Civil Action No. 74-4895-S

PARTIAL CONSENT DECREE

The parties to the above-entitled action agree to the entry of the following decree:

1. That defendants Paul Provencher and Steven A. Minter have, by their practice of refusing to accept, process, and grant cash refunds to households which have been wrongfully overcharged for food stamps purchased, failed to meeet the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, the Food Stamp Act of 1964, 7 C.F.R. §271.1(o), and 7 C.F.R. §271.1(q).

2. That defendants Paul Provencher and Steven A. Minter, their agents, successors in office, employees, attorneys and all other persons acting in concert or participation with them, are permanently enjoined from:

a) failing to accept, process, and grant cash refunds to households which have, are or will be overcharged for food stamps purchased;

b) failing to implement by April 1 ,1975 the procedures, policies, methods, and mechanics to effect such cash refunds;

c) failing to notify all households which have been, are or will be overcharged for food stamps purchased, that they are entitled to a cash refund and that they should contact their local welfare service office to effect the award.

It is so ordered.

Dated: March 7, 1975

Walter Jay Skinner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HELEN ROWEN, Et. Al., Plaintiffs v. PAUL PROVENCHER, Et. Al., Defendants	Civil Action No. 74-4895-S

DECREE AND ORDER

Having heard the arguments of counsel, having considered the memoranda submitted by both parties and having found that so-called "0 purchase households" whose food stamps have been wrongfully delayed, denied, terminated or suspended can best recoup their loss through issuance to them of additonal allotments of stamps in accordance with procedures outlines below which procedures permit recoupment in the shortest reasonable time, minimize the risk of food stamp traffic, and accord with Bermudez v. U.S.D.A., 348 F. Supp. 1279 (D.D.C. 1972), aff'd, 490 F.2d 718 (D.C. Cir. 1973), cert. denied sub nom. Butz v. Bermudez, 414 U.S. 1104, 94 S.Ct. 737 (1973), it is hereby ordered that:

1. by May 1, 1975 the Department of Agriculture and the Massachusetts Department of Public Welfare shall provide forthwith to 0 purchase households whose food stamps have been wrongfully delayed, denied, terminated or suspended an allotment of stamps, in addition to such households' regular monthly allotment, in the amount of fifty percent (50%) of the household's monthly coupon allotment for as many consecutive months as is necessary to recoup fully the lost food stamp benefits.

2. the Department of Agriculture shall require the Department of Public Welfare to inform all 0 purchase households found to have been wrongfully delayed, denied, terminated or suspended that the retroactive relief described above is avilable and shall initiate the above procedures to effect the award forthwith.

3-31-75

Walter Jay Skinner
DISTRICT JUDGE

VI PROCEDURES FOR MDPU

The following guidelines present the basic operations required of the MDPU in establishing and maintaining the master issuance record file, preparing and mailing ATP cards, and controlling and reporting fiscal and participation data. State or local agencies may use general office machines, reproduction plate equipment, electro-mechanical accounting machines, or electronic data processing equipment to carry out these operations. Modification of some procedures described here may be necessary depending on the equipment which is used. Some modifications accompany exhibits illustrating the forms to be used in these operations.

C Emergency ATP Cards - In emergency cases (newly certified households in immediate need, loss or theft of ATP's, etc.) immediately prepare those ATP's which the household will need in order to participate before the next regular preparation of ATP's. Either the CU or the MDPU may prepare emergency ATP's provided that there are no delays in allowing the household to participate. When the monthly processing of executed ATP cards (paragraph D below) reveals that a household has used both regular and replacement ATP's to acquire more bonus coupons than they are certified to receive, the MDPU shall immediately notify the CU to determine if a claim against the household is warranted.

CERTIFICATION

I hereby certify that I served a copy of the foregoing Brief of Plaintiffs-Appellees and Joint Appendix by depositing the same in the United States mails, first class postage prepaid, this 11th day of July, 1975, addressed to:

Edmund C. Walsh, Esquire
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Marilyn Kaplan Katz

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Attorney for Plaintiffs-Appellees